IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

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OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, filed May 11, 1977, is reported at _____ Ariz. _____, 566 P.2d 273, and is found in the Appendix (hereinafter referred to as App.). Page *97-117*.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on May 11, 1977. Timely motions for rehearing by both parties were

denied on June 28, 1977. A Petition for Writ of Certiorari and Motion to proceed in forma pauperis were filed within ninety (90) days of that date, and were granted by this Court on October 17, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal United States Constitutional provisions involved are the Search and Seizure Clause of the Fourth Amendment, Self-Incrimination Clause of the Fifth Amendment, Right to Counsel Clause of the Sixth Amendment and Due Process Clause of the Fourteenth Amendment, the pertinent texts of which are as follows:

Amendment Four:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Five:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Amendment Six:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Amendment Fourteen, Section 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

QUESTIONS PRESENTED

1. Did not the admission of evidence seized in a four day long warrantless search of Petitioner's residence, after the residence had been secured by police, violate Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution?
2. Did not the admission of Petitioner's responses to police questioning made while Petitioner was a patient in the intensive care unit of a hospital violate Mr. Mincey's privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution?

STATEMENT OF THE CASE[1]

Arrest and Search

The case at bar arises out of an incident in Tucson, Arizona on October 28, 1974, in which an undercover police narcotics officer was fatally wounded. At approximately 2:00 p.m. on that date, in

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[1]For citations to portion of record not appearing in App., the following abbreviations will be used:

Mincey's handwritten statement appended to brief (App. Br. _____);
Trial Transcript (T.T. _____);
Grand Jury Transcript (G.J.T. _____);
Hearing Transcript January 31, 1975 (H.T.J. _____);
Hearing Transcript February 3 and 4, 1975 (H.T.F. _____).

an attempt to buy a quantity of unlawful drugs, undercover officer Barry Headricks accompanied by Charles Ferguson went to an apartment leased by Mr. Mincey. App. 98, G.J.T. 18. Officer Headricks, in order to disguise his true identity as a police officer, wore longish hair, a mustache, a flower print shirt, cowboy boots, levis and a levi jacket. App. 23. After being admitted into the apartment, an offer was allegedly made to sell narcotics for which Charles Ferguson and Mr. Mincey were later charged.

Undercover agent Headricks left the apartment, allegedly to return with money in order to complete the purchase. App. 99. According to a prearranged "plan" Headricks returned with nine other armed plainclothes narcotics agents and a Deputy Pima County attorney. App. 22, 24. Their intention was to gain entry by the use of a ruse, and upon entry, to arrest the occupants of the apartment and seize any evidence. App. 21, 22, 24. Headricks and another agent, with their drawn guns hidden behind their backs approached the apartment door. App. 99, H.T.F. 9, 18, 19. The remaining officers and county attorney, with guns drawn, hid in the hallway on either side of the door. App. 25, 27, 99, H.T.J. 147. The door was opened by John Hodgman. App. 24, 99, H.T.F. 10.

After Headricks slipped into the apartment, Hodgman attempted to close the door. App. 24, 26, 99, H.T.F. 10-11. The other agents forced entry (App. 24, 26, 99) pushing Hodgman partly through the wall behind the door. App. 27, 99, H.T.F. 40. Headricks entered the bedroom at the back of the apartment and shortly thereafter some thirteen gunshots were heard in rapid succession coming from the bedroom. App. 41, 99, H.T.J. 149, G.J.T. 63-64. In the gunfire Officer Headricks and the two bedroom occupants, Mr. Mincey and Deborah Johnson, were wounded. App. 33-35, 41, 100. Charles Ferguson was also wounded by a bullet which passed through the bedroom wall. App. 41, 99, G.J.T. 45-47. When the shooting had stopped, Headricks came out of the bedroom, said something like "he's down" and fell to the ground. App. 100, H.T.F. 41-42, G.J.T. 49.

Mr. Mincey was found lying on his back in the bedroom, unconscious. App. 41, 100. The entire incident transpired in a matter of seconds. H.T.J. 149.

After the shooting, the narcotics officers secured the crime scene for the arrival of a special investigative unit. App. 27-29. The narcotics agents themselves did not search or seize anything. App. 27, 30, 37. From the time of the shooting until approximately four days later when the search conducted by the investigative unit was completed, the apartment was in the exclusive control of the police. App. 27-29, 32-33, 37-39.

The investigating unit conducted a "systematic" search of the premises over a four day period. App. 35-38, 77. The expressed purpose of the search was to uncover "narcotics paraphernalia". App. 36. During the course of the search the leader of the investigative unit was informed that Officer Headricks had died at the hospital. App. 37.

The search was exhaustive. Every room, drawer and cupboard was searched and inventoried, including all of Mr. Mincey's personal belongings. App. 37-39, 77-82. No search warrant was ever obtained, nor was any reason given by the investigating agents for not obtaining one. App. 29, 38. No exigent circumstances existed at the time of the search. *State v. Mincey*, _____ Ariz. _____, 566 P.2d 273, 283 (1977).

Interrogation

Shortly after the shooting incident, while Mr. Mincey was in the emergency room of the hospital, police Detective Hust arrived at the hospital and removed the handcuffs from Mr. Mincey in order to facilitate treatment by the medical staff. App. 42-43. Mr. Mincey was depressed near to the point of coma and breathing insufficiently. App. 82-83. Resuscitative drugs were administered in an effort to aid Mr. Mincey. App. 82-83. A part of Mr. Mincey's pelvic bone, the neck of his thigh and his femur had all been struck by the bullet. App. 82. The bullet had also at least partially severed Mr. Mincey's sciatic nerve, a nerve which controls "large muscle movements with the lower leg". App. 83.

The next contact that Detective Hust had with Mr. Mincey was three or four hours later in the intensive care unit of the hospital, after Mr. Mincey had undergone surgery. App. 43-44. After obtaining permission from a nurse, Elizabeth Graham, Hust began interrogating Mr. Mincey. App. 65. Nurse Graham also told Mr. Mincey that it would help if he cooperated with Detective Hust's questioning. App. 65-66.

Mr. Mincey was unable to talk at the time of the interrogation due to the presence of an intertracheal tube inserted down his throat to administer oxygen. App. 44-45, 62. He also had a Foley catheter tube inserted through his penis to his bladder, a tube running from his nose down into his stomach to prevent the aspiration of vomit, and was receiving intravenous fluids. App. 66-67. In addition, Mr. Mincey had received antibiotic and antitetanus drugs. T.T. June 3, 1975 Page 51.

Mr. Mincey, being unable to talk, responded to Detective Hust's questions by writing his answers on paper provided by the hospital. App. 46. Detective Hust did not record the questions he asked, but at a later date attempted to reconstruct the questions from Mr. Mincey's written responses and notes made by the detective the following morning. App. 45-47, 61.

Detective Hust initially began his interrogation of Mr. Mincey with questions concerning Charles Ferguson. App. 46-47. Thereafter, Detective Hust read Mr. Mincey his *Miranda* rights and told him that he was under arrest for killing a police officer. App. 50, 60. Mr. Mincey repeatedly advised his interrogator that he could respond no more without an attorney. App. 47-49, 61, 91. App. Br. 3, 4, 7, 9. However, the interrogation continued.

On at least six separate occasions during the interrogation Mr. Mincey requested the assistance of counsel. App. 91, 93, App. Br. 3, 4, 7, 9. On three occasions Mr. Mincey made unambiguous written requests that the questioning be stopped. App. Br. 3, 4, 7, 9. Also, on numerous occasions, Mr. Mincey expressed his confusion and uncertainty as to his ability to accurately recall the facts. App. 47-49, App. Br. 3, 4, 7, 9. Mr. Mincey expressed the

fear that without the aid of counsel, he "might saw [sic] something thinking that it meant something else". App. Br. 7. Mr. Mincey further advised Detective Hust that he was experiencing unbearable pain. App. 48-49, App. Br. 7, 9.

Mr. Mincey was exhausted throughout the interview. On three occasions during the course of the interview, Detective Hust left the room when "the nurse or doctor would have to go in to do certain medical things or if it looked as if he [Mincey] was getting a little bit exhausted . . ." App. 59. Nurse Graham testified that Mr. Mincey had not slept since his arrival in the intensive care unit because there were "so many admitting things to pester him with". App. 66. Mr. Mincey's confusion is illustrated by his uncertainty regarding whether the same person had conducted the various sessions of questioning. App. 92-93.

Detective Hust testified that the duration of the interrogation was only an hour. The time readings on the upper right hand corners of the papers upon which Mincey wrote his statement (20:15, 22:30 and 23:20) indicate that the questioning lasted over three hours. App. Br. 3 (20:15), 5 (22:30) and 8-9 (23:20).

Finally, Mr. Mincey was ignorant of the law and of law enforcement techniques. He had never been in trouble with the law before. Regarding his procedural rights in his trial, he stated, "they don't have to prove you did it, you have to prove you didn't do it." App. 93, App. Br. 9.

Trial and Appeal

At the time of trial Rufus Mincey, a black man, was a twenty-three year old United States Air Force machinist who, prior to the aforementioned incident, had never been charged with a felony. He was charged with, tried by a jury, and convicted of first degree murder (committed in avoiding or preventing a lawful arrest), Ariz. Rev. Stat. Ann. §§13-451, 452 and 453, assault with a deadly weapon, Ariz. Rev. Stat. Ann. §13-249(B), unlawful sale of narcotics, Ariz. Rev. Stat. Ann. §36-1002.02, unlawful

possession of a narcotic drug for sale, Ariz. Rev. Stat. Ann. §36-1002.01, and unlawful possession of a narcotic drug, Ariz. Rev. Stat. Ann. §36-1002. He was sentenced to life imprisonment without possibility of parole before serving twenty-five years on the first charge, ten to fifteen years imprisonment on the second, concurrent with the first; five to fifteen years imprisonment on the third, consecutive to the life sentence; five to six years imprisonment on the fourth, concurrent with the third; and two to three years imprisonment on the fifth charge, concurrent with the third.

At trial, Mr. Mincey's attorney moved to suppress the evidence seized in the search of Mr. Mincey's apartment which included bullets, narcotics and narcotics paraphernalia. The motion was denied. Mr. Mincey's attorney also moved to suppress the statements made during Mr. Mincey's hospital interrogation. That motion was granted. However, over Mr. Mincey's objection, the trial court allowed the statements made during his interrogation to be used to impeach his testimony at trial. App. 74.

On appeal, the Arizona Supreme Court reversed Mr. Mincey's convictions for murder and assault with a deadly weapon because of an erroneous mens rea instruction but affirmed the convictions on the remaining counts. Because the sentences on the affirmed counts were originally to have run consecutively to the life sentence on the murder charge, the court remanded the affirmed counts for reimposition of sentences. _____ Ariz. _____, 566 P.2d 273, 285. The Arizona Supreme Court held that the evidence obtained in the search and interrogation here challenged was properly admitted. The court found that the search of Mr. Mincey's residence did not come within the exigent circumstances exception to the warrant requirement, but held that it was justified by a "murder scene" exception, discussed in more detail hereafter. In so doing, the court expressly refused to follow the decision of the United States Court of Appeals for the Ninth Circuit in *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972).

Further, the court held that Mr. Mincey's responses during his in-hospital interrogation were voluntarily made and, therefore, were properly admitted for impeachment under *Harris v. New York*, 401 U.S. 222 (1971). Both Mr. Mincey and the State of Arizona timely moved for rehearing of the Arizona Supreme Court's opinion. Both motions were denied on June 28, 1977. Petitions to this Court for a writ of certiorari and Motion to proceed in forma pauperis were granted on October 17, 1977.

SUMMARY OF ARGUMENTS

I.

The admission of evidence obtained in a four day long warrantless search of Mr. Mincey's apartment could not be justified under any of the traditional exceptions to the Fourth Amendment warrant requirement. The Arizona Supreme Court upheld it under a "murder scene exception."

This Arizona exception, as applied to Mr. Mincey, is inconsistent with the principles and purposes of the Fourth Amendment. The search of Mr. Mincey's apartment constituted a substantial intrusion upon his reasonable expectation of privacy. Instead of the detached prescreening of a magistrate, Arizona's exception makes determinations whether or not a search is to be made dependent upon the hurried discretion of a police officer engaged in the often competitive enterprise of law enforcement, and it is not even clear that probable cause is required for a search under the Arizona exception. The scope of searches under the Arizona exception is virtually unlimited. And an individual questioning the officer's authority to search has no evidence of the officer's authority and must question at his peril.

There is no legitimate or compelling rationale which justifies the Arizona exception's deviation from the Fourth Amendment warrant requirement. No other state has gone as far toward

disembowelling the Fourth Amendment warrant requirement as Arizona does in Mr. Mincey's case.

II.

The admission of Mr. Mincey's responses to police questioning made while in the hospital's intensive care unit was not justified by *Harris v. New York*, 401 U.S. 222 (1971). Mr. Mincey's responses were not inconsistent with his trial testimony, and inconsistency is implicit in the rationale of *Harris*.

The responses also did not fit the *Harris* requirement of statements which are voluntary and trustworthy. Mr. Mincey's responses were given while he was tired, weak, confused, and in pain. They were given when the interrogating officer persisted in questioning despite Mr. Mincey's repeated requests to discontinue the questioning and to obtain a lawyer to be present during questioning. Mr. Mincey was isolated and helpless to control his situation. The responses were the product of an overborne will.

The lack of reliable records of the questions to which responses were given, and the lack of a finding of voluntariness by the trial court also violated due process.

ARGUMENTS

ARGUMENT I

THE ADMISSION OF EVIDENCE OBTAINED IN A FOUR DAY WARRANTLESS SEARCH OF MR. MINCEY'S RESIDENCE AFTER THE RESIDENCE HAD BEEN SECURED BY POLICE VIOLATED MR. MINCEY'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The Arizona Supreme Court upheld the admission of evidence which was the fruit of the warrantless, four day search of Mr. Mincey's residence. That Court ruled the evidence admissible under a state court created "murder scene exception", a warrantless search is lawful where (1) the search occurs at the scene of a serious personal injury with likelihood of death, (2) there is reason to suspect foul play, (3) law enforcement officers were legally on the scene premises in the first instance, (4) the search begins within a reasonable time after officials first learn of the murder or potential murder, and (5) the search is "limited [in scope] to determining the circumstances of death". App. 112. *State v. Mincey*, _____ Ariz. _____, 566 P.2d 273, 283 (1977). The Court conceded that the search of Mr. Mincey's residence did not "fit within the usual 'exigent circumstances' exception and that there was ample time to secure a warrant". App. 111. Thus, if the Fourth Amendment does not countenance Arizona's "murder scene exception", the search here was unlawful and the evidence seized therein should have been excluded. *Mapp v. Ohio*, 367 U.S. 643 (1961).

This Arizona judicially created exception to the warrant requirement cannot stand consistently with the long standing principles and purposes embodied within the Fourth Amendment.

The Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 347, 351 (1967). It protects people from

unreasonable government intrusions into their legitimate expectations of privacy. *United States v. Chadwick*, 97 S.Ct. 2476, 2481 (1977).

The general rule of the Fourth Amendment is that searches conducted without a warrant, that is, without the prior approval of a judge or magistrate, are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); exceptions to the rule are jealously and carefully drawn and the burden is on those seeking the exception to show the need for it.

The searches and seizures which were foremost in the minds of the framers of the Bill of Rights were those involving invasions of a person's home. *United States v. Chadwick*, 97 S.Ct. 2476, 2481 (1977). By tradition, a person's home was his castle and fortress. *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604) (Lord Coke). Just such a search took place in this case. Mr. Mincey never consented to a search, never relinquished his expectation of privacy from government intrusion into his home. The degree of intrusion to which he was subjected is manifested by the fact that the search extended over a four day period, that it included inventorying every single item in Mr. Mincey's residence, and that every room, drawer, cupboard, nook and cranny was searched.

One foundation of the warrant requirement is that it requires the detached scrutiny of a neutral magistrate before any intrusion takes place. Such detached consideration is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Arizona's murder scene exception substitutes for judicial scrutiny the discretion of a law enforcement officer who is charged with determining whether an apparent or suspected injury is "serious", "likely to produce death", and whether "there is reason to suspect foul play". The degree of conviction the officer must have, be it suspicion, reasonable grounds for belief,

clear and convincing evidence, belief beyond a reasonable doubt, etc., is not spelled out by the Arizona Supreme Court. Both the terms "reasonable to believe" and "possibility" are used. *State v. Mincey*, 566 P.2d at 284. The Arizona Supreme Court could not claim that police officers in general have any medical expertise rendering them specially qualified to determine whether an injury is likely to produce death. In any event, the officer's discretion is the sole protection an individual has against governmental intrusion. *Cf., Johnson v. United States*, 333 U.S. 10, 14 (1948). Only if the search is fruitful, is it likely there will be some judicial scrutiny of the matter. And then, the scrutiny is not based upon contemporaneous recollection. Instead, the scrutiny must be based upon the recollections of an officer who has the benefit of hindsight.

Another foundation of the warrant requirement is that it helps limit the scope of intrusions: it is more likely that a search will not exceed proper bounds when it is done pursuant to a judicial warrant particularly describing the place to be searched and the persons or things to be seized. *United States v. Chadwick*, 97 S.Ct. 2476, 2482 (1977). Although the Arizona Supreme Court purported to place limitations (to what is necessary to determine the circumstances of death) upon the scope of "murder scene" searches, in reality, it did not. What true limitations are there if, as in Mr. Mincey's case, the "limitations" permit the police to conduct a four day long search, inventorying every item in a man's home, when their expressed intention at the outset is to find evidence of narcotics, rather than to establish the circumstances of death.

A third foundation of the warrant requirement is that it apprises an individual of the extent of his privacy rights and the extent of police authority. It assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Cf., Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). Under the "murder scene" exception, an individual

questioning an officer's authority to search or seize can only bar his way or progress and risk arrest and criminal conviction.

The search of Mr. Mincey's residence was remote from and not incident to an arrest within the meaning of *Chimel v. California*, 395 U.S. 752 (1969). It was not justified by any exigent circumstances depriving the officers of time to obtain a warrant and threatening the safety of the police or the loss or destruction of evidence. *State v. Mincey*, 566 P.2d 273, 283 (Ariz. 1977). It may be noted that a judicial warrant could have been obtained at any time by telephone or other remote communication. 5 Ariz. Rev. Stat. Ann. §13-1444(C) (Supp. 1973). It may also be noted that in this case there was a prosecutor actually on the scene at the time the premises to be searched were entered. Further, the searched premises were placed under the exclusive dominion of police authority prior to the search.

What justification does the Arizona Supreme Court claim for its "murder scene" exception? It offers no explanation of the rationale for permitting a "murder scene" exception in its opinion in this case and none is provided in *State ex rel. Berger v. Superior Court*, 110 Ariz. 281, 517 P.2d 1277 (1974). Indeed, the only explanation ever offered by the Arizona Supreme Court for creating such an exception was the argument that such warrantless searches were justified by the "need for all citizens and particularly potential victims such as this to effective protection from crime". *State v. Sample*, 107 Ariz. 407, 410, 489 P.2d 44, 47 (1971), *writ of habeas corpus ordered conditionally granted*, sub nom. *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972); *see State v. Duke*, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974).

If "effective protection [of potential victims] from crime" is the rationale for warrantless searches, who was it the police were protecting in Mr. Mincey's case when all of the suspects were in custody before the search began? If "effective protection from crime" is the rationale, why should there be more protection afforded where alleged crimes involve bodily injury than for

other classes of crimes? The Arizona Supreme Court has simply made an arbitrary determination that cases involving bodily injury are more serious than other cases and require less attention to the protection of individual rights. If Arizona can make such a determination now, then in the future it or other jurisdictions can abolish the search warrant requirement in cases of rape, espionage, treason, extortion, kidnapping, terrorism, arson, counterfeiting, robbery and burglary, each of which is a class of crimes posing serious threats to society.

Who is to say which class of crimes is most serious? The argument that more "effective" protection from crime is needed is an argument which may be made against every restraint the Constitution imposes upon police authority in the interest of personal liberty. Moreover, the Arizona Supreme Court has never shown, and it could not show, how its proposed exception to the warrant requirement would significantly increase police protection over that permitted by the traditional exigent circumstances exception.

There is no legitimate rationale for Arizona's murder scene exception.

The "murder scene" exception is not a doctrine permitting police entry upon premises. It is a doctrine permitting warrantless searches.

In some instances, courts have spoken about murder scene exceptions to warrant requirements when their intent was to authorize police to enter premises with the intent of rendering emergency aid. *See Root v. Gauper*, 438 F.2d 361, 364-65 (8th Cir. 1971). Even if such had been a consideration in the development of the Arizona doctrine, the police here did not enter with the intent of making arrests. The search itself occurred after the injured people had been removed from the premises.

The police in Mr. Mincey's case knew before the search began that Officer Headricks' injuries had resulted from gunshot wounds. The search, therefore, was not conducted in aid of treatment, as for example might be the case in a poisoning incident.

If the Respondent claims, as a rationale for the exception that the record in this case would have justified the issuance of a warrant, this Court has already answered that issue.

> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority". *United States v. Chadwick*, 97 S.Ct. 2476, 2486 (1977).

The Arizona Supreme Court first claimed a "murder scene" exception in *State v. Sample*, 107 Ariz. 407, 489 P.2d 44 (1971), but the United States Court of Appeals for the Ninth Circuit refused to accept such an exception and directed that a writ of habeas corpus be issued for Sample unless retrial proceedings against him were commenced within ninety (90) days. *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972).

There is no other jurisdiction which has attempted to carve as broad an exception to the warrant requirement as Arizona's "murder scene" exception. In Mr. Mincey's case, the Arizona Supreme Court relied on six cases from other jurisdictions. *State v. Mincey*, 566 P.2d 273, 283 n.4 (1977). None of those cases, however, are analogous to Mr. Mincey's case. Most of them seem to be primarily concerned with a doctrine justifying police entry upon the premises.

Stevens v. State, 443 P.2d 600 (Alaska 1968) did not rely upon or declare a "murder scene" exception. Rather, it held that where an investigating officer was lawfully on the scene and all items seized, photographed, etc. had been in his plain view, a delay of ten hours before the items were seized, occasioned by the first officer waiting ten hours until better trained officers could make their way to the remote village involved, was not unreasonable or constitutionally violative. *Stevens v. State*, 443 P.2d at 602-03.

Likewise, there is no reference to a "murder scene" search warrant exception in *Patrick v. State*, 227 A.2d 486 (Dela. 1967). The opinion simply holds that police who came on the premises

for the purpose of bringing emergency aid to a reportedly injured person were lawfully on the premises and there was no search where they seized items in plain view.

In *People v. Wallace*, 31 Cal. App.3d 865, 107 Cal. Rptr. 659 (1973), although there is language suggestive of a murder scene exception, the facts are distinguishable from Mr. Mincey's case. *Wallace* gave suspicious and conflicting explanations for the victim's injury. He invited police on the premises, his home. The police had reasonable grounds to believe the victim had been stabbed and that the weapon was still on the premises. The opinion carries the implication that the police had insufficient evidence to arrest *Wallace* and had reason to believe that evidence of a battery or homicide would be destroyed if they did not act quickly. In fact, later California cases interpret *Wallace* as an exigent circumstances case. *People v. Eckstrom*, 43 Cal. App.3d 996, 118 Cal. Rptr. 391 (1974); *People v. Superior Court*, 41 Cal. App.3d 636, 116 Cal. Rptr. 24 (1974).

State v. Chapman, 250 A.2d 203 (Me. 1969), which also contains some broad language, is also distinguishable on its facts. The defendant invited officers on the premises and consented to their "look[ing] around". Circumstances existed which gave the police reason to believe that evidence would be lost if they didn't act quickly. The evidence seized was in plain view except for one item which was found in a trash barrel, (the Court thought this was not abandoned because the barrel was in the garage and the seized item had been stuffed down underneath some trash).

Similarly *State v. Oakes*, 129 Vt. 241, 276 A.2d 18, *cert. denied*, 404 U.S. 965 (1971) is distinguishable on its facts. The police entered the premises at the defendant's invitation, and all items later seized were in plain view. A delay in completing the investigation due to a shortage of manpower in the rural area was not unreasonable. A warrant was obtained before detailed investigation began. And, in any event, any error in receiving the evidence was harmless since it tended to prove matters which were not contested at trial.

In *Loguest v. State*, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972), the police entered in response to a telephone call from the defendant to a third person and with the aim of rendering emergency aid if the victim was alive. All items seized, except one, were in plain view. And if there was error in receiving the evidence, it was harmless since it related to uncontested matters.

The search in this case violated the spirit, purpose and letter of the Fourth Amendment. The evidence which derived from that search should have been suppressed.

ARGUMENT II

THE ADMISSION OF MR. MINCEY'S RESPONSES TO POLICE QUESTIONING MADE WHILE MR. MINCEY WAS A PATIENT IN THE INTENSIVE CARE UNIT OF A HOSPITAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND RIGHTS TO COUNSEL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The use of Mr. Mincey's responses to police questioning while in the hospital's intensive care unit violated his privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution. The trial court and the Arizona Supreme Court found the responses to have been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1964). However, both the trial court and the Arizona Supreme Court sustained their admissibility as within the exception created by *Harris v. New York*, 401 U.S. 222 (1971). *State v. Mincey*, _____ Ariz. _____, 566 P.2d 273, 280, 281 (Ariz. 1977). As this Court is

aware, *Harris* and the decisions which have followed it[2] permit an accused person to be impeached[3] with *Miranda* violative statements if (1) the statements are inconsistent with the accused's testimony at trial bearing directly on the crime charged, and (2) the statements were obtained under circumstances assuring their trustworthiness and voluntariness. The statements in the case at bench meet neither requirement.

The responses used for impeachment were not inconsistent with Mr. Mincey's testimony at trial. Mr. Mincey testified that he had seen a gun in Officer Headricks' hand when Headricks entered the bedroom. App. Page 84, T.T. June 5, 1975 Page 162-164. As impeachment, the prosecution offered a statement made in response to a question which asked, did "this guy" who came into the bedroom have a gun? App. Page 86, 87. The response had been, "I can't say for sure. Maybe he had a gun," and Mr. Mincey indicated that he hadn't been sure whether by "this guy" the interrogator had mean't Headricks or the officer who found him after he'd been shot, or what. App. Page 92.

Mr. Mincey also testified that at the time Officer Headricks entered the bedroom with his gun drawn, he had no idea the entry was for purposes of making an arrest. App. Page 88, 89. The prosecutor offered a statement made in response to a question regarding what Mr. Mincey had meant when he wrote that "all hell turned loose". App. Page 89. Mr. Mincey's response, given at a time when he had already been informed that he was under arrest and being charged with the murder of a police officer (App. Page 50, 60) was that he meant when the "bust" took place. App. Br. Page 5. That response simply indicated that several hours after Headricks entered his bedroom and after Mr. Mincey had been made aware that Headricks and his companions were police

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[2]E.g. *Oregon v. Haas*, 420 U.S. 714 (1975)

[3]Arizona permits prior inconsistent statements to be considered by the jury as substantive evidence. *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973).

officers, and after Mr. Mincey had been advised that he was under arrest and was being charged with murder of a police officer, Mr. Mincey knew that the commotion had resulted from a police "bust"; it did not indicate what his knowledge or state of mind was at the time of the break-in.

The rationale for permitting an exception to the *Miranda* exclusionary rule is that the shield provided by *Miranda* should not be perverted into a license to testify inconsistently or perjuriously. *Harris v. New York*, 401 U.S. 222, 226 (1975); *Oregon v. Haas*, 420 U.S. 714, 722 (1975). That rationale becomes meaningless if the statements introduced to impeach are not in fact inconsistent. Inconsistency, therefore, is an integral part of the *Harris* admissibility test. Furthermore, as this Court has recognized, it is basic to the law of evidence that before a prior statement can be used to impeach by inconsistency, the statement must indeed be inconsistent. *United States v. Hale*, 422 U.S. 171 (1975). And a witness must be given full opportunity to clarify his statement before impeachment testimony may be admitted. *The Charles Morgan*, 115 U.S. 69 (1885). Neither criterion was met in this case.

Whether or not Mr. Mincey's testimony at trial was inconsistent, his responses to the in-hospital interrogation failed to meet traditional standards of trustworthiness and voluntariness. The statements made in the intensive care unit of the hospital were the direct result of an overborne will. The circumstances under which the statements were made are undisputed. The interrogation began three or four hours after Mr. Mincey's admission to the hospital and following surgery. App. Page 43. He required the administration of resuscitative drugs. App. Page 82-83.

Upon admission, Mr. Mincey was almost to the point of coma. App. Page 82-83. At times during the interrogation, Mr. Mincey looked exhausted to his interrogator. App. Page 59. He had not slept for some time. App. Page 66. The interrogating officer testified that the interrogation lasted about an hour. App. Page 59. The officer's notes on the hospital paper Mr. Mincey used for

his answers indicate the interrogation lasted over three hours. When a person is fatigued, his will is more easily overborne. *Leyra v. Denno*, 347 U.S. 556, 560 (1954); *Cf., Ashcraft v. Tennessee*, 327 U.S. 274 (1946), 322 U.S. 143, 153-54 (1944).

The only sustenance that Mr. Mincey was receiving was through intravenous feeding. The lack of substantial food diminishes one's physical strength and ability to resist. *Cf., Davis v. North Carolina*, 384 U.S. 737, 746 (1966).

Mr. Mincey repeatedly expressed to Detective Hust his confusion and inability to recall accurately the facts of the shooting incident. App. Page 47-49, App. Br. Page 3, 4, 8, 9. He was not even sure whether the same person had conducted the various sessions of questioning. App. Page 92-93.

Mr. Mincey was being given oxygen through a "T-bar", a device generally used only for more critical patients. App. Page 65. He had a nasal gastric tube running from his nose to his stomach to prevent him from aspirating vomit, and was catheterized. App. Page 66-67. Mr. Mincey indicated that he was in pain and that the pain was unbearable. App. Page 48-49, App. Br. Page 7, 9. Such intense pain also diminishes the ability to resist. *Cf., Beecher v. Alabama*, 408 U.S. 234, 236 (1972); *Reck v. Pate*, 367 U.S. 433, 441-42 (1961); *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924).

Mr. Mincey recalled that after he had been shot, a police officer stood over him yelling "move, nigger, move". App. Page 47, App. Br. Page 3. This initial abuse lent an atmosphere of intimidation to the stream of events which followed. *Cf., Beecher v. Alabama*, 408 U.S. 234, 236 (1972); *Clewis v. Texas*, 386 U.S. 707, 710 (1967). At least twice, Mr. Mincey made written requests that the questioning be discontinued, and requested the aid of counsel at least six times. The failure to inform a suspect of his right to counsel is a "significant factor" in determining the voluntariness of a statement. *E.g., Davis v. North Carolina*, 384 U.S. 737, 740 (1966). Even more intimidating is the effect of having one's requests for counsel and that questioning be stopped

repeatedly denied, frustrated or ignored. *Cf., Culombe v. Connecticut*, 367 U.S. 568 (1961).

The only persons who had access to Mr. Mincey were the police and hospital personnel. Nurse Graham, in whose hands Mr. Mincey's well being was entrusted, encouraged him to respond to Detective Hust's questioning. App. Page 65-66. Isolation from one's friends and from counsel has been consistently recognized by this Court as an important factor to be considered in determining voluntariness. *Cf., Sims v. Georgia*, 389 U.S. 404 (1967); *Haynes v. Washington*, 373 U.S. 503 (1963); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Haley v. Ohio*, 332 U.S. 596, 598 (1948).

Mr. Mincey had received numerous drugs in an effort to stabilize his condition. Nurse Graham was unsure whether Mr. Mincey was under the influence of drugs at the time of the interrogation. Statements made under the influence of drugs do not meet traditional standards of voluntariness. *Cf., Townsend v. Sain*, 372 U.S. 293 (1963).

Mr. Mincey's lack of experience with the police is yet another factor to be considered in determining voluntariness. *Cf., Reck v. Pate*, 367 U.S. 433, 441 (1961); *Haley v. Ohio*, 332 U.S. 596 (1948).

Mr. Mincey was helpless. He could not walk away from the police officer or even turn his back on him. He could not even speak to tell him to leave. He could only communicate by laborious writing. His strength was sapped by serious injury and surgery. He was in pain, weak and confused. He asked for counsel and to be left alone, but no one complied; no one came to his aid, not even the one person he should have been able to turn to, his nurse. The questioning continued, unrelenting and without regard to his pleas to stop or for counsel. The police officer would not leave Mr. Mincey alone until he received the statements he was seeking.

Clearly, Mr. Mincey's will was overborne. The above-described factors cannot be considered circumstances assuring the voluntariness or trustworthiness of his statements.

It must be emphasized that all we can be sure of are Mr. Mincey's protestations and statements, since they were written out. There are no equally accurate records of what questions were asked. In fact, the lack of contemporaneous recording of what questions Mr. Mincey's answers were in response to renders the admission of his responses a denial of due process. *Cf., United States v. Shoupe*, 548 F.2d 636 (6th Cir. 1977).

It should also be noted that the trial court here never made a finding that the statements admitted against Mr. Mincey were voluntary, in contravention of *Jackson v. Denno*, 378 U.S. 368 (1964).

Since Mr. Mincey's hospital interrogation statements do not meet the test of *Harris*, they should have been suppressed.

CONCLUSION

For the foregoing reasons, Mr. Mincey respectfully urges that the judgment of the Supreme Court of the State of Arizona be reversed and that this Court hold that the admission at Mr. Mincey's trial of evidence obtained in the search of Mr. Mincey's residence and of evidence obtained in the in-hospital interrogation denied Mr. Mincey due process of law.

Respectfully submitted,

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APPENDIX

1

Elizabeth B. [illegible] RN
1010 10/28/74 [illegible]
Arizona ~~[illegible]~~ Medical Center

Ph 7.44
36
182
95.3
24.2 40%

A-26666

3283

10-28-74
2015

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UNIVERSITY HOSPITAL

PROGRESS NOTES

[I was present during the writing of these notes (Frank [illegible] 10-28-74 [illegible] University Hospital.)] 10-28-74 20:15

(I was present during this interview [illegible] Elizabeth [illegible] R.N. University Hospital 10-28-74 2000)

I know him for 2 Days

Dud with Board

Chuck

fair He has a Ride at the fair in south Tucs

Every body knew every body

I Remember some body standing over me saying move nigger move I was on the floor beside the bed.

This is all I can say without a lawyer.

Im going to have to put my head together. there are so many things that I don't remember. I. Like how did they get into the apt.

Police

Do you me Did he give me some money (no)

What do you call a sample.

I can't say without a lawyer

Let me get my self together first. You see im not for sure. every thing happened so fast. I can't answer at this time because I [illegible] [illegible] so. but I can't say for sure.

Some questions aren't clear to me at the present time. This writing was [illegible] a [illegible] of

[illegible] present [illegible]

Elizabeth A. [illegible]

10-28-74 2100

3

talking because I could not TALK at the time of the interview

If It's possible to get a Lawer now. we can finish the talk. He could direct me in the right direction where as without a Lawyer I might saw something thinking that it means something else. is it still inside me My Right Leg I can't use it I can't even move it. The pain is unbearable. I'll help you if I can. in every way possible

My name is A1C Rufus J Mincey
100 FMS Davis Monthan
BLKs 4202 B 24.
3550 shop.

would you please Let some one know where I am.

3

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PROGRESS NOTES

I CAN'T SAY. I have to see a Lawyer. I'm charged with murder so the police man says. How is Debra
I don't know who the police man was. which one was the NARC
Did he wear on cowboy boots.
There Are A lot of things that aren't clear. Two guys arrested the one with the beard.
John, who else
when Do we go to trail
You didn't see Anybody else
No one saw Anybody else. In the Apt. Well get it together.
why. It's void I I don't sign
I hate to sign things in the Blind

This information was given so that It might Bring this case to A end. You Asked me some questions and I answered to the best of my ablity At the present time. This is not to say I can't change my information At A Later Date, because I'm not sure as of now

(Hust

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FLOW SHEET

I have given this statement voluntarily. Signed [illegible]
Witnessed [illegible]
22:30 10-28-74 [illegible]

10 Barry [illegible] his old lady went for a week to see [illegible]. Chuck went. They came back and said Chuck was in the car with 2 guys. One of the guys came with Chuck. So I left and when he came back all hell turned loose. When he came back a bust ~~[illegible]~~ took place. Bust you see I'm not for sure. People were all over the house. I couldn't figure out weather it was a bust or rip off. I have a gun in the house .380 4's place in particular. I showed it to Chuck and he showed me ~~[illegible]~~ his. Look like a .38 sp. Take to the car with him (he didn't take any drugs out of the apt) this for sure. when he left by his self.

[signature]

5

I can sign this because I remember these things. not because [illegible] is talking same bullshit.

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FLOW SHEET

[illegible] present while [illegible] voluntarily wrote this. Elizabeth [illegible] 10-28-74 2320

Thats why I have To have time to redo ~~the~~ every thing that happened in my mind

nobody answered Door with gun.

John Didn't have A gun You see that's something on me. I was in the Bed Room. Lets Rap tomarrow. face to face. I can't give facts If something happens that I don't Know about. why would Chuck give John his gun if he came with the guy

Questions I need to know.
When I heard All the noise I run out to Check it out then I went Back to the Bed room. where was chuck I can't say for sure maby the Guy had a Gun

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FLOW SHEET

[illegible] present while [illegible] voluntarily wrote this. Elizabeth [illegible] 10-28-74 2320

If I don't Tell any Lies I don't have to make things up to make the Lie Look Like the truth. Let John talk. All he can do is tell the truth. or get Caught telling A Lie. Same, Same. I want A good Lawyer. I charged with murder thats bad weather you did it or not. You Don't have to prove you did something You have to " " didn't

Ohd. how many [illegible] came through that Door.
what Time will you come tomarrow. I'll be waiting I Don't have to Like I want some legal guidance I can't talk now what good is this doing. Every thing I have said is the truth. There are A lot of thing Left out. After I get A Lawyer you'll come. I won't Lie
my leg hurt I want to try to go to sleep. Tell Deb That I miss her

STATE OF ARIZONA } ss.
COUNTY OF PIMA }

The foregoing instrument is a full, true, and correct copy of the original on file in this office.
Attested Oct. 26 1977
NORMA [illegible], Clerk
By [illegible] Deputy